OFFICE OF GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 06-89 August 31, 2006

TO: All Regional Directors, Officers-In-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Post-Election Notices to Employers in RC Elections
Revision of OM 00-44 Attachments

As part of the General Counsel's initiative to closely monitor first-year bargaining, a review of the attachments to OM 00-44 was conducted.

Pursuant to OM 00-44, Regions were requested to serve specific notices of bargaining obligations on a representative of each party immediately after the period for filing objections expired. Attachment A was to be distributed when a labor organization received a majority of the valid votes cast and Attachment B was to be distributed when determinative challenges affected the outcome of the election.

As a result of the recent review, it was determined that the language contained within the aforementioned attachments should be revised to more fully educate employers regarding their post-election bargaining obligations in an effort to promote good faith bargaining and to further reduce the incidence of unlawful unilateral changes. Therefore, all Regions should begin serving one of the revised attached notices on a representative of each party immediately after the period for filing objections has expired. Revised Attachment A is to be distributed when a labor organization received a majority of the valid votes cast and Revised Attachment B is to be distributed when determinative challenges affect the outcome of the election.

It is expected that, in addition to educating the parties as to their responsibilities under the Act, we will also conserve Agency resources. If you have any questions concerning this memorandum, please contact your AGC, Deputy, or the undersigned.

/s/
R.A.S.

Attachments (2)
cc: NLRBU
Release to the Public

ATTACHMENT A (REVISED)
NOTICE OF BARGAINING OBLIGATION

As a result of the representation election recently conducted, a labor organization has received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment commences on the date of the election.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are subsequently overruled and the labor organization is certified as the employees' collective bargaining representative, THE EMPLOYER'S OBLIGATION TO ABSTAIN FROM MAKING UNILATERAL CHANGES TO BARGAINING UNIT EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT BEGINS ON THE DATE OF THE ELECTION, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances[1], an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period that objections are pending where the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities that could accrue if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective bargaining representative, it violates Sections 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of bypassing, undercutting, and undermining the labor organization's status as the statutory representative of the employees. It is of no consequence that the changes may have been motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees for monetary losses incurred, with interest, as a result of the unilateral implementation of these changes, until such date as the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

In essence, the employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, as long as THE EMPLOYER GIVES SUFFICIENT NOTICE TO THE LABOR

[1] Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

ORGANIZATION CONCERNING THE PROPOSED CHANGE(S), NEGOTIATES IN GOOD FAITH WITH THE LABOR ORGANIZATION, UPON REQUEST, and GOOD FAITH BARGAINING BETWEEN THE EMPLOYER AND THE LABOR ORGANIZATION LEADS TO AGREEMENT OR OVERALL LAWFUL IMPASSE.

ATTACHMENT B (REVISED)
NOTICE OF BARGAINING OBLIGATION

The representation election recently conducted did not result in a final determination because challenged ballots affect the outcome of the election. The Region will conduct an investigation to determine the eligibility of the challenged voters and issue a report on their status as soon as possible.

If the resolution of the challenged ballots, or of any objections to the election filed by the employer or by some other party pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board), results in the certification of the labor organization as the employees' collective bargaining representative, THE EMPLOYER'S OBLIGATION TO ABSTAIN FROM MAKING UNILATERAL CHANGES TO BARGAINING UNIT EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT BEGINS ON THE DATE OF THE ELECTION, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances[2], an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period that challenges and/or objections are pending where the final determination about the certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities that could accrue if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective bargaining representative, it violates Sections 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of bypassing, undercutting, and undermining the labor organization's status as the statutory representative of the employees. It is of no consequence that the changes may have been motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer may be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees for monetary losses incurred, with interest, as a result of the unilateral implementation of these changes, until such date as the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

In essence, the employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, as long as <u>THE EMPLOYER GIVES SUFFICIENT NOTICE TO THE LABOR ORGANIZATION CONCERNING THE PROPOSED CHANGE(S), NEGOTIATES IN GOOD FAITH WITH THE LABOR ORGANIZATION, UPON REQUEST, and GOOD</u>

[2] Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

FAITH BARGAINING BETWEEN THE EMPLOYER AND THE LABOR ORGANIZATION LEADS TO AGREEMENT OR OVERALL LAWFUL IMPASSE.